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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-79

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, *et al.*,

Petitioners,

VS.

ROBERT L. ACREE, *et al.*

No. 72-167

ANN GUNTER DRUMMOND, *et al.*,

Petitioners,

VS.

ROBERT L. ACREE, *et al.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

JOHN H. RUFFIN, JR.
1101 11th Street
Augusta, Georgia 30903

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
SYLVIA DREW
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents
ROBERT L. ACREE, *et al.*

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 458 F.2d 486 and the opinion of the United States District Court for the Southern District of Georgia at 336 F. Supp. 1275.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

These two petitions for writs of certiorari to review the same judgment of the United States Court of Appeals for the Fifth Circuit, one filed by the school authorities of Richmond County, Georgia and one filed by a group of white parents who intervened in this school desegregation action which had been pending since 1964, each present basically the same claim: that the order of the district court, as affirmed by the Court of Appeals, directing implementation of a pupil desegregation plan of which transportation was an integral part is unauthorized by the principles elucidated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) because (a) the plan is projected to achieve at each elementary school a student body of racial composition so nearly identical as to merit description as a "racial balance" plan; and (b) the time, distance and expense of the transportation which would be required to implement the order is so great as to be beyond the sort of plans contemplated by this Court in *Swann*. The petition in No. 72-167 also raises certain questions with respect to a recently enacted statute which have never been presented to any court in the context of this case and which, in any event, have no bearing upon this case.

Statement

We shall not belabor the facts by adding materially to the already lengthy statements set out in the Petitions; the clearest and most cogent description of the history of this

school desegregation case is to be found in the district court's order, reprinted at pages A-7 through A-32 of the Appendix to the Petition in No. 72-167.

After this Court's decision in *Swann, supra*, a pending appeal in the United States Court of Appeals for the Fifth Circuit was remanded to the district court with instructions "forthwith to constitute and implement a student and faculty assignment plan that complies with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education . . .*" *Acree* v. *County Board of Education*, 443 F.2d 1360. At that time, the public schools of Richmond County, Georgia operated upon a strict geographic zoning student attendance plan, under which traditionally black and white schools retained their racial identities. (See 336 F. Supp. at 1277-78, Appendix to Petition in No. 72-167, pp. A-12 through A-13). Following a series of conferences, hearings, and opportunities afforded respondents to prepare and propose a desegregation plan for the Richmond County schools which would meet constitutional standards, (none of which were acted upon), the district court (pursuant to the authority confirmed by *Swann*) appointed its own experts to suggest alternative desegregation plans, and approved one of such plans for implementation on a phased basis, with complete implementation to occur effective with the commencement of the 1972-73 school year.

All parties appealed and on March 31, 1972 the judgment of which review is sought, affirming the district court order with a modification only as to timing, was entered.

Reasons Why the Writs Should Be Denied

These petitions do little more than simply ask this Court to overrule its decision in *Swann* because once again a school board and some of its white patrons do not desire effective desegregation of the public schools. The vaunted

"racial balance" supposedly to be achieved by implementation of the district court's order is hardly the "wooden resort to racial quotas" which this Court held in *Swann* was not required to remedy the denial of Fourteenth Amendment rights. See *Drummond* v. *Acree*, No. A-250 (September 1, 1972) (Mr. Justice Powell, Circuit Justice), page 3.

Both Petitions list the overall population ratios of the various zones within which individual schools are paired (Petition in No. 72-79, pp. 9 and 10; Petition in No. 72-167, p. 10) rather than demonstrating the variation between the populations of each school. These are shown in the projections submitted by the court-designated experts (reprinted at pp. A-39 through A-54 of the Appendix to the Petition in No. 72-167). The individual schools are projected to range from 28.7% black (p. A-48) to 50% black (p. A-42). While this range is not quite so large as that in Charlotte, it is Petitioners, and not the plaintiffs or either of the Courts below, who are here exaggerating numbers far beyond their significance.

Whatever one's view of the range in racial breakdowns among schools from 28 to 50%, the plan ordered implemented by the district court was not designed to come as close to the system-wide ratio in Richmond County as possible. In fact, it was not prepared from data listing the race, residence and grade level of every student in the system (which would have permitted its draftsmen to design zones for individual or paired schools so as to bring about a far closer tolerance among the various schools) but was based simply upon combining the previously existing zones for each school, which had been drawn by the county school authorities, and altering their grade structures through contiguous and non-contiguous pairing and clustering, in accordance with their capacities and the need to bring about some real desegregation.

Frankly, it is difficult to understand the exaggerated claims in both Petitions that this is a racial balance plan. The explicit holdings to the contrary by both courts below are clearly correct; the mandates of this Court in *Swann* received only respectful application by a district court operating under great pressure and without cooperative assistance from the school authorities,[1] and a Court of Appeals intimately familiar with the issues in school desegregation cases.

In a similar vein, the Petitions are filled with claims that the transportation of school children required under this plan is far greater in distance, time and expense than that approved by the Court in *Swann*. Curiously there is not a single reference to any evidence concerning these matters in either Petition but merely the sort of *ad hoc* claim that a round trip of 11.8 miles in Richmond County will take two hours a day (Petition in No. 72-79, p. 8). There may be some practical problems in implementing the desegregation plans, but not only will "a good faith effort by the school board . . . overcome any logistical problems that might arise," 458 F.2d at 488, but neither the decree of the district court nor the judgment of the Court of Appeals in any way restricts the parties from seeking modifications should insuperable, practical difficulties arise when the plan is actually implemented. See *Kelley* v. *Metropolitan County Board of Education*, No. 71-1778 (6th Cir., May 30, 1972) at pp. 22-25 (reprinted as Appendix A).[2]

In short, none of the Petitioners have raised significant claims of any substance to the effect that the lower courts exceeded the equitable remedial powers described in *Swann*,

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[1] Here, as in *Swann*, the exercise of remedial authority by the district court was prompted by the total default of school officials.

[2] Thus intervenors should present any "less rending" (Petition in No. 72-167, p. 16) but equally effective elementary school desegregation plan to the district court.

and only the overruling of that unanimous decision could justify altering the judgment below.

Finally, the Petitioners in No. 72-167 make some suggestions that Sections 805 and 806 of the Education Amendments of 1972, P.L. 92-138, somehow affect this litigation. As to Section 805, there is not a whisper of a suggestion in the Petition that the trial court employed any non-uniform rule of evidence in reaching its result; and with regard to Section 806, we are unable to fathom any suggestion in this Court's *Swann* decision that it would not apply its interpretation of 42 U.S.C. § 2000c-6 in any appropriate case no matter in what jurisdiction it arose. In any event, that section applies or does not apply to this case in exactly the same manner as it did in *Swann*.

CONCLUSION

For the foregoing reasons, respondents Acree, et al. respectfully pray that the writs of certiorari be denied.

Respectfully submitted,

JOHN H. RUFFIN, JR.
1101 11th Street
Augusta, Georgia 30903

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
NORMAN J. CHACHKIN
SYLVIA DREW
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents
ROBERT L. ACREE, *et al.*

Appendix A to Brief in Opposition to Certiorari

Nos. 71-1778-79

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT W. KELLEY, ET AL.,
HENRY C. MAXWELL, JR., ET AL.,

Plaintiffs-Appellees,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Decided and Filed May 30, 1972

Before:

EDWARDS, CELEBREZZE and McCREE,

Circuit Judges.

* * * * *

III PRACTICAL PROBLEMS

If there is an appellate issue of substance in this appeal, it is to be found in the practical problems which appellants

claim have developed since the entry of the District Judge's order. Appellant summarizes these issues thus:

> A plan which exposes the children in the school system to undue danger to health and accident, interferes with their education by requiring excessive periods of time on buses, causes them to leave home before daylight or to return home after dark, exposes them to the dangers of travel in old and inadequately maintained equipment and causes elementary school children, both black and white, to suffer hardships to which young children should not be exposed can hardly be termed feasible, workable, effective and realistic.

Substantial as these problems appear to be on the surface, there are two reasons why no relief can be granted in this forum. The first is that no motion for relief pertaining to these facts has ever been filed by appellant in the District Court. These statements at this point are allegations and they are controverted by the appellee. This, of course, is an appellate court—not a trial court. As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims have been presented in a trial court, with an opportunity for sworn testimony to be taken and controverted issues and facts decided by the processes of adversary hearing, this court has no jurisdiction.[2]

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[2] During the pendency of an appeal, jurisdiction of the case lies, of course, in the appellate court. There is, however, familiar law to deal with an unexpected problem which arises in this period concerning the actual terms of the order or judgment under appeal. The District Court may on being apprised of the problem and having determined its substantiality (with or without hearing) certify to the appellate court the desirability of a remand for completion or augmentation of the appellate record. No memory in this court encompasses a refusal of such a request.

The record is clear that no request for remand was made by the District Court, obviously, at least in part, because appellants made no motion for relief before the District Court.

The second reason as to why appellants are entitled to no relief on this issue probably serves to explain the first. The entire "record" upon which appellant bases his plea for relief as to practical problems is a "Report to the Court" of Dr. Brooks, Director of Schools of the Metropolitan County Board of Education. This report is dated October 18, 1971, just over a month after the opening of school. While we are advised that it was sent to the District Judge, as we have noted, no motion of any kind seeking any District Court action was ever filed concerning it. Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge.

Dr. Brooks' affidavit does present this exculpatory explanation which serves to point in the direction of other authorities as those responsible for the inconveniences and hazards of which Dr. Brooks' statement speaks. The statement says:

> The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School.

It is clear, however, that neither the Metropolitan City Council or, for that matter, the Legislature of Tennessee can forbid the implementation of a court mandate based upon the United States Constitution. In a companion case to *Swann, supra,* Chief Justice Burger, writing again for

a unanimous court, held that an anti-busing law which flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes was invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46 (1971). *See also Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Dr. Brooks' statement also furnishes the bus schedule of the Metropolitan County Board of Education by yearly models. It shows that the Board has an average of 18.9 buses for each of the last 10 model years. The 18 buses purchased in 1971 were described by Dr. Brooks as "to replace obsolete equipment." It appears from the Metropolitan Board's own statements that the Board and the local authorities in Nashville did not purchase one piece of transportation equipment for the purpose of converting the Metropolitan County Board of Education school system from a dual school system segregated by race into a unitary one, as called for by the District Judge's order.

At court hearing we had been puzzled as to why counsel for the Board had failed to go back to the District Court to report on the grievous circumstances which he so strongly alleged before us. Like most decrees in equity, an injunctive decree in a school segregation case is always subject to modification on the basis of changed circumstances. *Sloan* v. *Tenth School District of Wilson County*, 433 F.2d 587, 589-90 (6th Cir. 1970). Further acquaintance with the record, which, of course, the District Judge would have known in detail, leaves us in no further quandry as to the reasons for counsel's reluctance.

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